

DEMOCRATIC GOVERNANCE: AN EMERGING CUSTOMARY NORM?

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‘A great principle is spreading across the world like wildfire. That principle, as we all know, is the revolutionary idea that the people, not governments, are sovereign. This principle has, in (the last) decade, . . . acquired the force of historical necessity . . . Democracy today is synonymous with legitimacy the world over; it is, in short, the universal value of our time.’¹

INTRODUCTION

International law has traditionally regarded the peoples of the world as being represented in the international arena by the governments in de facto control of their respective states. Except where such governments are imposed by foreign invasion or conduct themselves in ways inimical to international peace and security, these governments are conventionally deemed worthy of respect and protection under international law - in particular, respect regarding ‘matters which are essentially within the domestic jurisdiction’² and protection ‘from the threat or use of force’.³ The method by which a government of domestic origin achieves or retains power was not ordinarily thought of as a basis for withholding such protection. As US Chief Justice Taft ruled in the *Tinoco Arbitration*,⁴ the domestic

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¹ Bureau of Public Affairs, Current Policy No 1240, *Panama: A Just Cause* (1990) 2 statement of Luigi R Einaudi, US Permanent Representative to the OAS.

² *Charter of the United Nations* art 2(7).

³ *Charter of the United Nations* art 2(4).

⁴ *Tinoco Concession Case*, (Great Britain v Costa Rica) 1 RIAA (1923) 369, 381-382 reprinted in (1924) *18 AmerJInt’IL*, 147 at 154.

constitutionality of the seizure of power is considered beyond the scope of international concern:

‘The issue is not whether the new government assumes power or conducts its administration under constitutional limitations established by the people during the incumbency of the government it has overthrown. The question is, has it really established itself in such a way that all within its influence recognise its control, and that there is no opposing force assuming to be a government in its place? Is it discharging its functions as a government within its own jurisdiction?’⁵

Four decades later, amidst the creation of the United Nations and its provisions trumpeting the right of citizenry to participation and the protection of this right by international law, the principle still held sway and was to hold sway way into the future. In 1961, Professor Hans Kelsen restated the principle as follows:

‘Under what circumstances does a national legal order begin or cease to be valid? The answer, given by international law, is that a national legal order begins to be valid as soon as it has become - on the whole - efficacious; and it ceases to be valid as soon as it loses this efficacy ... The Government brought into permanent power by a revolution or coup d’etat is, according to international law, the legitimate government of the state, whose identity is not affected by these events.’⁶

⁵ *Tinoco Concession Case*, (Great Britain v Costa Rica) 1 RIAA (1923) 369, 381-382 reprinted in (1924) 18 *AmerJInt’lL*, 147 at 154.

⁶ Hans Kelsen, *General Theory of Law and State* (Anders Wedberg translation). New York: Russell, 1961, 220-221.

During the Cold War, it was nearly impossible for the international community as a whole to agree both that a particular state was undemocratic and that international action should be taken against that state. The single exception concerned the process of decolonisation. A consensus gradually developed within the United Nations that the denial of majority self-rule in the colonial territories of Africa and Asia should be treated as an international delict.⁷ When white minority regimes in South Africa and elsewhere resisted the transition to majority rule, states could agree, within the context of the United Nations system, to apply economic and diplomatic sanctions.⁸ By defining apartheid regimes as per se violative of international law,⁹ states could treat the character of the white minority governments as a legitimate subject for international action, without exposing all undemocratic regimes to similar scrutiny and pressure.

It is significant that in the case of South African diplomatic credentials were denied on the basis of the internal character of the regime. Through its de jure violations of one of the *Charter of the United Nation's* few unambiguous and broadly supported norms of racial equality, the South African Government subjected itself to ever-increasing scrutiny and disapproval from the General Assembly, embodied in innumerable resolutions, including refusals to take action on credentials. These measures culminated in the passage by the General Assembly of a resolution declaring that the South African regime had no right to represent the people of South Africa and that the liberation movements recognized by the Organisation of African Unity were the authentic representatives of the overwhelming

⁷ See: Gassama, I. 'Reaffirming Faith in the Dignity of Each Human Being: The United Nations, NGOs, and Apartheid' (1996) 19 *Fordham International Law Journal*, 1464 at 1472-1488 discussing the comprehensive global campaign launched against apartheid in South Africa.

⁸ Gassama, I. 'Reaffirming Faith in the Dignity of Each Human Being: The United Nations, NGOs, and Apartheid' (1996) 19 *Fordham International Law Journal*, 1464 at 1480-1488.

⁹ Gassama, I. 'Reaffirming Faith in the Dignity of Each Human Being: The United Nations, NGOs, and Apartheid' (1996) 19 *Fordham International Law Journal*, 1464 at 1478-1480.

majority of the South African people.¹⁰ The resolution went on to request all specialized agencies and other intergovernmental organisations to deny membership or privileges of membership to the South African regime and to invite, in consultation with the Organisation of African Unity, representatives of the liberation movements of the South African people recognized by the organisation to participate in their meetings.¹¹ The general consensus regarding the illegality of the South African regime was an exception as the history of United Nations credentials controversies in the Cold War era attests. It is instructive that the international community's views in this era regarding regime legitimacy were generally permissive and often international recognition of governments favoured the government (whether legitimate or illegitimate) in effective power rather than some seemingly legitimate putative authority.¹² This was notwithstanding General Assembly passed Resolution 396, passed shortly after the United Nations was created. This Resolution states clearly that:

‘whenever more than one authority claims to be the government entitled to represent a Member State in the United Nations and this question becomes the subject of controversy in the United Nations, the question should be considered in the light of *the Purposes and Principles of the Charter and the circumstances of each case*’¹³

¹⁰ *Situation in South Africa resulting from the policies of apartheid*. GA Res 3151(G), UN GAOR, 28th sess, Supp No 30, [11], UN Doc A/9030 (1973).

¹¹ *Situation in South Africa resulting from the policies of apartheid*. GA Res 3151(G), UN GAOR, 28th sess, Supp No 30, [13], UN Doc A/9030 (1973).

¹² The United Nations has known eight significant credentials contests involving China, Hungary, Congo (Leopoldville), Yemen, Cambodia (1973-1974 and post-1978), South Africa and Israel. The de facto regime was denied credentials in the cases of China (1950-1971), Hungary (1957-1963), Cambodia (post-1978) and South Africa (1974), and narrowly prevailed in the case of Cambodia in 1973-1974. For a concise discussion of this see: Roth, B. ‘Government Illegitimacy Revisited: “Pro-Democratic” Armed Intervention in the Post-Bipolar World’ (1993) *Transnational Law and Contemporary Problems*, 48 at 495-499.

¹³ GA Res 396, UN GAOR, 5th sess, Supp No 20, [1], UN Doc A/1775 (1950). (Emphasis added).

Though the idea that the international community can protect human rights was one of the great practical achievements manifested in the *Charter of the United Nations* with international law at the vanguard of giving tangible expression to the rights, the Cold War tied the issue to ideological and revolutionary agendas. ‘Common interest’ and ‘common good’ were seen as nothing more than a diplomatic screen hiding the avaricious and predatory aims of the imperialist Powers.¹⁴ The effect of this position was to strengthen sovereignty considerations as the United Nations became a ground for cultivating the agenda of nationalism brought to the fore with the appearance of the ‘Third World’ as a force in the years after World War II. Realpolitik not law was the governing force in the Cold War era with the purposes and principles of the *Charter of the United Nations* frozen on paper and rarely seen in practice.

The end of the Cold War, which paralysed the United Nations from its inception, was a cause for celebration and hope. In the early 1990s, Western leaders congratulated themselves over the end of communism and the fall of the Soviet empire. Following the historic Security Council Summit Meeting of January 1992, the then Secretary-General of the United Nations, Boutros Boutros-Ghali, spoke of a growing conviction ‘among nations large and small, that an opportunity has been regained to achieve the great objectives of the *Charter of the United Nations* - a United Nations capable of maintaining international peace and security, of securing justice and human rights and of promoting, in the words of the *Charter of the United Nations*, “social progress and better standards of life in larger freedom”.’¹⁵

¹⁴ See: Korovin, I. ‘Respect for Sovereignty: An Unchanging Principle of Soviet Foreign Policy’ (1956) *International Affairs* (Moscow), 11 at 32, 37-9.

¹⁵ Boutros-Ghali, B. *Report of the Secretary General on the Work of the Organisation*, UN GAOR, 47th sess. [3], UN Doc A/47/277, S/24111 (1992).

New challenges arising from the strengthening of international human rights norms and the seemingly unprecedented spirit of international cooperation accompanied the end of bipolar geostrategic and ideological confrontation. The end of the Cold War witnessed a dramatic increase in the number, diversity and proportion of states formally committed to democratic principles.¹⁶ Many states also displayed a greater willingness to countenance foreign intervention in the name of democracy and human rights.¹⁷ On the one hand, liberal-democratic political values increased immensely in prestige in the wake of the collapse of the Communist Party states of Eastern Europe.¹⁸ On the other hand, dictatorships that, for political or geostrategic reasons, were once able to count on an automatic constituency on one or the other side of the bipolar divide suddenly found themselves vulnerable to broad international disapprobation. Whereas coups d'état and rigged elections in the Cold War era were considered business-as-usual, they were now candidates for concerted international response, not implausibly extending as far as internationally sanctioned armed intervention.¹⁹ But in many respects, the rhetoric in this area outpaced reality. Although various forms of intervention to promote democracy may be more politically palatable than in the past,²⁰ a broadly accepted content of democracy is yet to emerge.

¹⁶ See: Fox, G. 'The Right to Political Participation in International Law' (1992) 17 *Yale Journal of International Law*, 539 at 540.

¹⁷ See: Acevedo, D. 'The Haitian Crisis and the OAS Response: A Test of Effectiveness in Protecting Democracy' IN Damrosch, L. (ed) *Enforcing Restraint: Collective Intervention in Internal Conflicts* New York: Council on Foreign Relations Press, 1993, 119 at 141 recognizing that 'the notion that the illegal replacement of a democratically elected government is still a matter essentially within the domestic jurisdiction of its member states, and thus immune from international scrutiny, is no longer the axiomatic precept it once was'.

¹⁸ In the words of Carl Gershman: 'It has to be remembered that until recently there was a strong feeling that there was an alternative out there to Western liberal democracy. There was a belief in a higher form of democracy, one that emphasised results, equality, that could really achieve things.' Quoted in: Bernstein, R. 'New Issues Born from Communism's Death Knell' *New York Times*, 31 August 1991, 11.

¹⁹ Roth, B. 'Government Illegitimacy Revisited: ' "Pro-Democratic" Armed Intervention in the Post-Bipolar World' (1993) *Transnational Law and Contemporary Problems* 48 at 483.

²⁰ See: Acevedo, D. 'The Haitian Crisis and the OAS Response: A Test of Effectiveness in Protecting Democracy' IN Damrosch, L. (ed) *Enforcing Restraint: Collective Intervention in Internal Conflicts* New York: Council on Foreign Relations Press, 1993, 119 at 141.

In the early days of the post-Cold War era, prominent international law scholars were emphatic that representative government was an emerging international legal entitlement.²¹ International civil servants joined the mounting chorus proclaiming a new-shared consensus that democracy, human rights, and peace are inextricably linked. With routine announcements by Heads of state of their fealty to democratic norms, and insistence that leaders of other states do so as well, democracy was finally at the heart of the international agenda.²² International organisations passed numerous resolutions announcing that governmental legitimacy rests on the consent of the governed, and conditioned membership in their organisations on acceptance of democratic principles.²³ Even developing countries, once near monolithic in their opposition to any external involvement in domestic politics, began to commonly seek international legitimacy through external monitoring and even supervision of their electoral processes.²⁴ While the mantra ‘democracy is an idea whose time has come’ was loudly trumpeted in the last

²¹ See: Franck, T. ‘The Emerging Right to Democratic Governance’ (1992) 86 *AmerJInt’lL*, 46 at 47 arguing that representative democracy is gradually evolving from moral prescription to an international legal obligation in part based on custom and in part on the collective interpretation of treaties; Contrast: Fox, G. ‘The Right to Political Participation in International Law’ (1992) 17 *Yale Journal of International Law*, 539 at 540-541 noting that the number of democratic governments has increased from nine to over sixty-five countries since the turn of the century.

²² Wippman, D. ‘Defending Democracy Through Foreign Intervention’ (1997) 19 *Houston Journal of International Law*, 659 at 661-662.

²³ For example: The Council of Europe makes democracy a pre-condition for membership. See: ‘Statute of the Council of Europe’, 5 May 1949, art 3, 87 *UNTS*, 103 at 106. Similarly, the *OAS Charter* now provides for the suspension from the General Assembly of any member state whose ‘democratically constituted government has been overthrown by force’. See: ‘Protocol of Amendment to the Charter of the Organisation of American States’, 14 December 1992, art 9, (1992) 33 *ILM* 1005 (‘*Protocol of Washington*’) while not ratified by all OAS member states yet, this protocol amends the *OAS Charter*; Cerna, C. ‘Universal Democracy: An International Legal Right or the Pipe Dream of the West?’ (1995) *NYU Journal of International Law and Policy*, 289 at 293.

²⁴ See: Fox, G. ‘The Right to Political Participation in International Law’ (1992) 17 *Yale Journal of International Law*, 539 at 541; See Acevedo, D. ‘The Haitian Crisis and the OAS Response: A Test of Effectiveness in Protecting Democracy’ IN Damrosch, L. (ed) *Enforcing Restraint: Collective Intervention in Internal Conflicts*. New York: Council on Foreign Relations Press, 1993, 119 at 119-120 noting that the presence of monitors from the OAS and the United Nations legitimised Aristide’s government when he won the election in Haiti. This trend began in 1989, when the Nicaraguan Government invited both the United Nations and the Organisation of American States to help supervise its electoral process in order to verify the validity of the 1990 elections. See: Fox, G. ‘The Right to Political Participation in International Law’ (1992) 17 *Yale Journal of International Law*, 539 at 579-580.

decade of the 20th century, the content of democracy - its criteria and benchmarks - still remains bogged down in a quagmire of political and human rights discourse.

Though states are increasingly willing to embrace democratic ideals, the precise understanding of democracy continues to languish in uncertainty. The uncertainties are no surprise. The international community has long paid lip service to basic principles of democratic governance but it has proven extremely difficult to translate this agreement on basic principles into a consensus on the content of democracy. In part, this is because at the global level the principles at issue have been stated at a high level of generality - high enough to mask important substantive differences among states on the content of those principles.

‘As a result, large numbers of states have been able to sign on to international instruments proclaiming support for democracy and associated values, without any real agreement on the meaning of democracy or the means by which it should be given effect. Such differences among states surface when concrete measures are contemplated in specific cases.’²⁵

Even when states agree on the kinds of changes necessary to initiate or restore democracy in a particular country, they may disagree sharply on the role the international community should play in seeking such changes. Such differences reflect strong philosophical and political differences over the extent to which external actors may legitimately seek changes in the domestic politics of other states. In practice, therefore, cases in which broad international agreement on measures to be taken against undemocratic regimes can be achieved are the exception rather than the rule.

²⁵ Wippman, D. ‘Defending Democracy Through Foreign Intervention’ (1997) 19 *Houston Journal of International Law*, 659 at 664.

Democratic entitlement as a universal human right is a complex and multifaceted issue. The Article has as its modest aim a general reflection on the enshrinement of democracy as a universal entitlement and the movement of international law in a pro-democratic direction. The Article will seek to highlight the general uncertainties that continue to plague the democratic entitlement. The Article deliberately focuses on the United Nations system with reference also being given to regional efforts. The Article does not discuss the legal justifications and nature of measures to address undemocratic regimes. While such measures are significant in pro-democratic discourse, it is beyond the scope of the Article's general aim of exposing the thorny issues that surround democratic entitlement as a universal right.

GRAPPLING WITH THE DEMOCRACY QUESTION

Within the United Nations system, broad statements in support of democratic governance date back to 1948, when the United Nations adopted the *Universal Declaration of Human Rights* by consensus.²⁶ A number of articles in the *Universal Declaration of Human Rights* substantiate provisions of the *Charter of the United Nations* relating to the rights of the citizenry in member states. Articles 55 and 56 of the *Charter of the United Nations* contain specific provisions in this respect. Article 55(c) of the *Charter of the United Nations* commits the Organisation to the promotion of 'universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion'.²⁷ Under Article 56, 'All Members pledge themselves to take joint and separate action in co-operation with the Organisation for the achievement of

²⁶ See: *Universal Declaration of Human Rights*, GA Res 217A(III), UN Doc A/810 (1948).

²⁷ *Charter of the United Nations* art 55(c).

the purposes set forth in Article 55'.²⁸ Although falling far short of authorizing intervention, unilateral or multilateral, to compel compliance with human rights standards, these provisions do make clear that the pursuit of human rights does not, as such, constitute intervention 'in matters which are essentially within the domestic jurisdiction'²⁹ under Article 2(7).

The United Nations has promulgated instruments that are collectively equivalent to an International Bill of Rights³⁰ and helped gather international consensus for the idea that the populations of States have rights under international law. This extends to the protection of the rights, even against the government. Beginning with the *Charter of the United Nations* and the *Universal Declaration of Human Rights*, the United Nations has constructed a normative framework for the realisation of rights for the people.³¹ The framework has been sustained over time by the actions of States in signing and ratifying various international human rights and related instruments, some of which are now part of customary international law. The international collaborative efforts involving United Nations organs, human rights workers and others have helped publicise the plight of the oppressed millions who yearn for more personal liberties and freedom from arbitrary detention, execution and political purges.

Among the human rights deemed fit objects of international concern is the right of political participation. This right was embodied in Article 21 of the *Universal Declaration of Human Rights* as follows:

²⁸ *Charter of the United Nations* art 56.

²⁹ *Charter of the United Nations* art 2(7).

³⁰ The International Bill of Human Rights consists of the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights and its two Optional Protocols.

³¹ See: United Nations Centre for Human Rights, *United Nations, Human Rights and Elections: Handbook on the Legal, Technical and Human Rights Aspects of Elections*, United Nations Doc HR/p/ot/2 (1994).

- '1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
2. Everyone has the right to equal access to public service in his country.
3. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.'³²

Article 21 of the *Universal Declaration of Human Rights* states that 'the will of the people shall be the basis of the authority of government,' and that 'this will shall be expressed in periodic and genuine elections'.³³ Implicitly, then, Article 21 links governmental legitimacy to respect for the popular will. But this linkage does not appear in the subsequent, and legally binding, *International Covenant on Civil and Political Rights* ('*ICCPR*').³⁴ Article 25 of the *ICCPR* speaks of the right to participate in public affairs, including the right to genuine and periodic elections, but it does not purport to condition governmental authority on respect for the will of the people.³⁵ The language of Article 25 was intentionally drafted broadly enough to accommodate the wide range of governmental systems in place among the initial parties to the *ICCPR*.³⁶ As a result, even Soviet-bloc states felt free to ratify the *ICCPR*.³⁷ From their perspective, communist states satisfied the requirements of Article 25 by affording voters access to various participatory mechanisms as well as an opportunity to ratify their leadership in periodic, albeit single-

³² *Universal Declaration of Human Rights* art 21.

³³ *Universal Declaration of Human Rights* art 21.

³⁴ *International Covenant on Civil and Political Rights (ICCPR)*, 16 December 1966, 999 UNTS 171, (1966) 6 *ILM* 368.

³⁵ *International Covenant on Civil and Political Rights* art 25.

³⁶ See: Steiner, H. 'Political Participation as a Human Right' (1988) 1 *Harvard Human Rights Year Book*, 77 at 87-88, 90, 93.

³⁷ Steiner, H. 'Political Participation as a Human Right' (1988) 1 *Harvard Human Rights Year Book*, 77 at 91 noting that an amendment requiring a pluralist political party system was withdrawn as a concession to the Soviet Union.

party, elections.³⁸ Thus, the cost of consensus was language broad enough to obscure sharp differences among states on the nature of their commitment to democratic rule.

The differences between the two articulations in the *Universal Declaration of Human Rights* and *ICCPR* are interesting. As Professor Henry Steiner notes, the:

‘earlier instrument, influenced to a greater degree than the International Covenant by the tradition of liberal democracy, gives more emphasis to the role of the “will of the people” as the “basis of the authority of government”.’³⁹

‘The main ideological competitors of liberal democracy, adherents of one variant or another of Leninist vanguardism, did not, after all, deny the role of popular will as the basis of governmental authority; the often-used terms “people’s democracy” and “socialist democracy” were affirmations of fidelity to this notion, the revolutionary struggle being the ultimate embodiment of the popular will.’⁴⁰

Roth states:

‘The Declaration’s version is more threatening to non-liberal approaches because it contains, at least arguably, an unwelcome nexus between elections and governmental authority.’⁴¹

and explains that:

‘Article 21 of the Declaration can be read syllogistically to mean that the basis of governmental authority is such popular will as has been expressed in the elections, whereas

³⁸ Steiner, H. ‘Political Participation as a Human Right’ (1988) 1 *Harvard Human Rights Year Book*, 77 at 93.

³⁹ Steiner, H. ‘Political Participation as a Human Right’ (1988) 1 *Harvard Human Rights Year Book*, 77 at 87.

⁴⁰ Steiner, H. ‘Political Participation as a Human Right’ (1988) 1 *Harvard Human Rights Year Book* 77, at 87.

⁴¹ Roth, B. ‘Government Illegitimacy Revisited: “Pro-Democratic” Armed Intervention in the Post-Bipolar World’ (1993) *Transnational Law and Contemporary Problems*, 48 at 505.

non-liberal regimes would prefer it to mean that the popular will is (in some abstract sense) the basis of - and therefore expressed by - governmental authority, and is also expressed in elections. The Covenant version simplifies the matter by leaving undefined the relationship, if any, not only between authority and elections, but also between authority and participation.’⁴²

Tragically, outside of the decolonisation context, during the Cold War era, there was little international consensus on the requirements of democratic governance beyond the general but limited insistence on periodic and genuine elections found in the *ICCPR* and a number of other international legal instruments. As a result, states lacked generally accepted criteria by which to judge other states’ compliance with substantive democratic principles.⁴³ With the end of the bi-polar ideological competition that characterized the Cold War,⁴⁴ there has been a widely publicized shift in the character of public pronouncements about democracy. More states have made, through treaty or by means of non-binding but still influential declarations, formal commitments to democratic governance.⁴⁵ In addition, states, international organisations, human rights tribunals and legal scholars have sought increasingly to imbue that commitment with some real content to move beyond the simple but vague commitment to free elections contained in the *ICCPR*.⁴⁶

⁴² Roth, B. ‘Government Illegitimacy Revisited: “Pro-Democratic” Armed Intervention in the Post-Bipolar World’ (1993) *Transnational Law and Contemporary Problems*, 48 at 505. It should be recalled that the Covenant embodies a ‘legal’ commitment, whereas the Declaration was understood as embodying merely a ‘political’ commitment. If the legal commitment that states have made since 1966 falls short of the political commitment made in 1948, it is difficult to argue that states should now be held legally accountable to the greater commitment.

⁴³ See: Franck, T. ‘The Emerging Right to Democratic Governance’ (1992) 86 *AmerJInt’lL*, 46 at 47 discussing the problems associated with examining and monitoring elections for compliance with the existing ambiguous standards.

⁴⁴ Fox, G. and Nolte, G. ‘Intolerant Democracies’ (1995) *HarvInt’lLJ*, 1 at 5.

⁴⁵ See for example: ‘Joint Communique of United States-Mexico Binational Commission.’ 7 August 1989. (1990) 29 *ILM*, 18; ‘Conference on Security and Cooperation in Europe: Document of the Moscow Meeting on the Human Dimension, Emphasizing Respect For Human Rights, Pluralistic Democracy, The Rule of Law, and Procedures for Fact-Finding.’ 3 October 1991. (1991) 30 *ILM*, 1670 (*Moscow Document*’).

⁴⁶ See: Fox, G. and Nolte, G. ‘Intolerant Democracies’ (1995) *Harvard International Law Journal*, 1 at 3-5 describing efforts of ‘the international community to address the perennial question of what makes a state “democratic”’.

The democracy discourse however remains ‘straitjacketed’ by Article 2(7) of the *Charter of the United Nations* which prohibits intervention in the “domestic affairs” of other states. This Article remains a pillar of the *Charter of the United Nations* system and continues to cast a shadow over all debates relating to government legitimacy or illegitimacy. Accordingly, although many states have joined the promulgation of resolutions and declarations proclaiming support for democracy and the right of political participation,⁴⁷ they also stress that each state has the ‘sovereign right freely to choose and develop its political, social, economic and cultural systems, whether or not they conform to the preferences of other states’.⁴⁸ Though the international community may, under Articles 55 and 56, promote state observance of the right of citizens to participate in their governance, there is no clear authority to mandate a particular allocation of decision-making power within a sovereign state. In any event, an election’s ‘genuineness’ as referred to by both participation provisions, has no obvious criteria.

In a bid to give the participation provisions content and contour, in December 1988, the General Assembly called on the United Nations Human Rights Commission ‘to consider appropriate ways and means of enhancing the effectiveness of the principle of periodic and genuine elections,’ albeit ‘in the context of full respect for the sovereignty of Member States’.⁴⁹ The result adopted by the Economic and Social Council in May 1989 was a ‘framework for future efforts,’ the first heading of which was: ‘The will of the people expressed through periodic and genuine elections as the basis for the authority of

⁴⁷ See for example: Bell, D. ‘The East Asian Challenge to Human Rights: Reflections on an East West Dialogue’ (1996) 18 *Human Rights Quarterly*, 641 at 656 noting that most East Asian states endorsed the Universal Declaration of Human Rights ‘for pragmatic, political reasons and not because of a deeply held commitment to the human rights norms it contains’.

⁴⁸ *Enhancing the effectiveness of the principle of periodic and genuine elections*. GA Res 45/150, UN GAOR 3d Comm, 45th sess, Supp No 49A, UN Doc A/45/766 (1990) at 255.

⁴⁹ [GA Res 157, 43rd Sess, UN Doc A/RES/43/157 \(1988\)](#).

government’,⁵⁰ a phrase that clears up the above-mentioned ambiguity in Article 21 of the *Universal Declaration of Human Rights*. The document included mention of ‘the right of citizens of a State to change their governmental system through appropriate constitutional means’, and ‘the right of candidates to put forward their political views, individually and in cooperation with others’, and the need for ‘independent supervision’ of elections.⁵¹

Two years later, the General Assembly, with only eight dissenting votes, declared:

‘that determining the will of the people requires an electoral process that provides an equal opportunity for all citizens to become candidates and put forward their political views, individually and in co-operation with others’.⁵²

It nonetheless immediately added the words, ‘as provided in national constitutions and laws’,⁵³ and further recognized:

‘that the efforts of the international community to enhance the effectiveness of the principle of periodic and genuine elections shall not call into question each State’s sovereign right freely to choose and develop its political, social, economic and cultural systems, whether or not they conform to the preferences of other states.’⁵⁴

The net result, albeit limited, is a strengthening of the participation norm. More concretely, as a result of agreements among contending forces, the UN became involved

⁵⁰ *Report of the Economic and Social Council: Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections*, UN GAOR, 44th Sess., Annex, Agenda Item 12, UN Doc A/44/454 (1989) 2.

⁵¹ *Report of the Economic and Social Council: Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections*, UN GAOR, 44th Sess., Annex, Agenda Item 12, at 1, 2, UN Doc A/44/454 (1989) 2.

⁵² GA Res 45/150, U.N. GAOR 3d Comm., 45th Sess, Supp No 49, UN Doc A/45/49 (1990) para 3.

⁵³ GA Res 45/150, U.N. GAOR 3d Comm., 45th Sess, Supp No 49, UN Doc A/45/49 (1990) para 3.

⁵⁴ *Enhancing the effectiveness of the principle of periodic and genuine elections*. GA Res 45/150, UN GAOR 3d Comm, 45th sess, Supp No 49A, UN Doc A/45/766 (1990) at [4]. A second resolution, passed over the dissenting votes of twenty-nine nations (mostly Western democracies), reiterated in even stronger terms the norm of non-interference in national electoral processes: *Respect for the principles of national sovereignty and non-interference in the internal affairs of States in their electoral processes*. GA Res 45/151, UN GAOR, 45th Sess, Supp No 49A at 255 UN Doc A/45/49 (1990).

in election monitoring in member states including Haiti, Namibia, Nicaragua, Angola and Cambodia. In a sign that the United Nations was moving towards granting the concept of democracy content and contour, the mandate accorded the observer mission in the Nicaraguan case included:

‘(a) To verify that political parties are equitably represented in the Supreme Electoral Council and its subsidiary bodies (nine regional electoral councils and 4,100 electoral boards).

(b) To verify that political parties enjoy complete freedom of organisation and mobilization, without hindrance or intimidation by anyone.

(c) To verify that all political parties have equitable access to State television and radio in terms of both the timing and the length of broadcasts.

(d) To verify that electoral rolls are properly drawn up.’⁵⁵

Thus, far from merely verifying the honesty of the vote count, the United Nations mission in Nicaragua undertook to oversee intricate details not only of the electoral mechanism but of the contextual conditions. Although the United Nations presence came at the request of a sovereign government, and could not have been imposed in ordinary circumstances even under a permissive reading of Article 2(7), activities of this nature cannot but identify the United Nations with evolving norms of electoral legitimacy.

In yet another significant move in the early days of the post-Cold War era, support for democracy became increasingly identified with the maintenance of peace and security. The reaction to the 29 September 1991 Haitian coup seemed to evidence that the norm of popular participation was coming into its own as an international index of governmental legitimacy, at least where the international community has already become enmeshed

⁵⁵ *The Situation in Central America: Threats to International Peace and Security and Peace Initiative*. GA Res 44/10, UN GAOR, 44th sess, Annex I, Agenda Item 34, Appendix at 3 UN Doc A/44/375 (1989).

(through the ‘observer’ function) in domestic processes. Resolution 917 declared that the obstruction of the restoration of democracy in Haiti constituted a threat to peace.⁵⁶ By imposing sanctions and authorizing military intervention in order to restore democratic rule in Haiti, the Security Council further recognized democracy as an entitlement. The Security Council corroborated the claim of a population’s right to be governed by those whom they had elected freely, fairly and openly. On the adoption of Resolution 940,⁵⁷ US Representative to the United Nations Madeleine K. Albright stated that the resolution’s objective was ‘not to impinge upon the sovereignty of Haiti, but to restore the power to exercise that sovereignty to those who rightfully possessed it and to enable Haiti’, in the words of the *Charter of the United Nations*, to pursue ‘social progress and better standards of life in larger freedom’.⁵⁸ This echoed the sentiments that had been aired earlier by Boutros Boutros-Ghali, the then Secretary-General of the United Nations at the historic Security Council Summit Meeting of January 1992.⁵⁹

The UN sanctioned pro-democratic intervention in Haiti was part of the UN’s move to assume and implement a bold new agenda - the promotion of democracy and the connection between a democratic form of government and protection of human rights. ‘Demands for democratic participation encouraged international involvement, which in turn facilitated democratic elections, resulting in international legitimacy for UN election monitoring.’⁶⁰ The popular claim to free and fair elections brought dramatic changes of government in diverse nations around the globe. This demand for participatory rights

⁵⁶ SC Res 917, UN SCOR, 49th Sess, 3376th mtg, UN Doc S/RES/917 (1994).

⁵⁷ SC Res 940, UN SCOR, 49th Sess, 3413 mtg, UN Doc S/Res/940 (1994).

⁵⁸ Albright, M. *Statement by the U.S. Ambassador to the UN, addressing the UN Security Council* (July 30, 1994), in Security Council Authorizes Multinational Force ‘To Use All Necessary Means’ To Facilitate Departure of Military From Haiti, Return of President Aristide, Federal News Service (1 August 1994), available in LEXIS, NEWS Library, FEDNEW File.

⁵⁹ Boutros-Ghali, B. *Report of the Secretary General on the Work of the Organisation*, UN GAOR, 47th sess, [3], UN Doc A/47/277, S/24111 (1992).

⁶⁰ Stoelting, D. ‘The Challenge of UN-Monitored Elections In Independent Nations’ (1992) 7 *Stanford Journal of International Law* 371, 372-373.

created international pressure on governments to turn to various international entities especially the UN to bolster their democratic credentials through endorsement of their domestic elections by external electoral monitors.⁶¹

Election monitoring by the UN in independent nations signalled the start of a new foray by the UN. UN-monitored elections became one of the most visible manifestations of the right of peoples under international law to a democratic form of government.⁶² Governments' recognition that their legitimacy depends on meeting a normative expectation of the community of states⁶³ indicated that the norm was undergoing a period of definition and realization.

The 1990s witnessed a number of exciting new developments in the UN as it sought to match its democratic rhetoric with the necessary normative and institutional framework. In November 1991, the Secretary-General's guidelines on elections monitoring were released.⁶⁴ In 1992, the General Assembly welcomed the Secretary-General's plan to establish both a focal point and an Electoral Assistance Unit within the Secretariat, and to

⁶¹ Huntington, S. P. *The Third Wave: Democratization In The Late Twentieth Century*, University of Oklahoma Press, 1991, 183-85.

⁶² The legal basis to the right is found in Article 25 of the International Covenant on Civil and Political Rights, ratified by 100 nations:

Every citizen shall have the right and the opportunity . . . and without unreasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; (c) To have access, on general term, of equality, to public service in her country. *International Covenant on Civil and Political Rights (ICCPR)*, 16 December 1966, 999 UNTS 171, (1966) 6 *ILM* 368.

⁶³ See Franck, T. 'The Emerging Right to Democratic Governance' (1992) 86 *AmerJInt'lL*, 46 at 64 (Cold War impeded ability of Human Rights Committee to enforce participatory rights). During the debates over the adoption of the Universal Declaration of Human Rights, the Soviet Government strongly supported a concept of sovereignty that would allow a state a free hand within its own borders. Continuation of the Discussion on the Draft Universal Declaration of Human Rights: Report of the Third Committee, UN GAOR, 3d Sess, pt 1, 183d mtg. at 924, UN Doc A/777, at 922 (1948) (advocating a view of national sovereignty as 'the right of a state to act according to its own will, never serving as a tool of the policy of another State ...').

⁶⁴ The Guidelines were approved by the General Assembly in December 1991. See GA Res 130, 46th Sess, UN Doc A/RES/46/130 (1991).

establish two trust funds for electoral work.⁶⁵ The Electoral Assistance Unit came into being in 1992.⁶⁶ The office became a Division in 1994, and is now located within the Department of Political Affairs.⁶⁷ In 1993, the General Assembly placed electoral assistance in the context of democracy promotion by including language on ensuring ‘the continuation and consolidation of the democratization process’ in the body of the resolution.⁶⁸ This resolution also addressed some of the practical concerns emerging from the United Nations’ new work in the field.⁶⁹ In 1994, the General Assembly’s resolution supporting electoral work linked human rights work and democratization. In 1995, the General Assembly passed its standard electoral assistance resolution, with the term ‘democratization’ in its title.⁷⁰

In 1998, about a decade after the General Assembly had flagged a new role for the UN in seeking to uphold participatory rights of peoples,⁷¹ the UN again passed two resolutions.

⁶⁵ See GA Res 138, 47th Sess, UN Doc A/RES/47/138 (1992). The two trust funds were the United Nations Trust Fund for Elections Observation and the UNDP Trust Fund for Technical Assistance to Electoral Processes. See *id.* The same day, the yearly sovereignty resolution passed. See GA Res 130, 47th Sess, UN Doc A/RES/47/130 (1992).

⁶⁶ See Electoral Assistance Division, Electoral Assistance website (visited 18 May 2003) <<http://www.un.org/Depts/dpa/docs>>.

⁶⁷ See Electoral Assistance Division, Electoral Assistance website (18 May 2003) <<http://www.un.org/Depts/dpa/docs>>.

⁶⁸ GA Res 131, 48th Sess, para 4, UN Doc A/RES/48/131 (1993). The resolution also linked electoral work to the maturing human rights framework by recalling and affirming language from the World Conference on Human Rights’ Vienna Declaration and Programme of Action’s recognition that electoral assistance is ‘of particular importance in the strengthening and building of institutions relating to human rights and the strengthening of a pluralistic civil society....’ *Id.* at preamble.

⁶⁹ The 1993 resolution stressed the importance of adequate time in carrying out electoral work. It recommended that the United Nations ensure pre-election preparatory and post-election follow-up work; it called on the focal point to undertake more intensive coordination efforts with other UN organs involved in electoral work, especially the Human Rights Centre and the United Nations Development Programme (UNDP); and it called for coordination with NGOs. See *id.* The yearly sovereignty and non-interference resolution passed the same day. See GA Res 124, UN GAOR, 48th Sess, UN Doc A/RES/48/124 (1993).

⁷⁰ See Strengthening the Role of the United Nations in Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections and the Promotion of Democracy, GA Res 185, UN GAOR, 50th Sess, Agenda Item 112(b), UN Doc A/RES/50/185 (1996). The 1995 resolution also changed the time frame for the Secretary-General’s reporting on electoral matters: instead of a yearly report to the General Assembly, he was requested to report back after two years. See *id.*

⁷¹ See GA Res 146, 44th Sess, UN Doc A/RES/44/146 (1989); GA Res 147, 44th Sess, UN Doc A/RES/44/147 (1989).

The sovereignty resolution remained substantively the same as previous resolutions⁷² but the electoral assistance resolution was broader a sign that this aspect of UN involvement in the democratic crusade was coming of age.⁷³ Despite important developments, a bifurcated development continues to persist between the need to enforce democracy as a universal norm and the need to guarantee sovereignty of States. This bifurcation opens up an avenue for States with concern about shielding their internal policies from UN scrutiny especially so in view of the anxiety that the democratic crusade generates among many non-Western nations.

DEVELOPING INTERNATIONAL LAW IN PRO-DEMOCRATIC DIRECTION

The idea of democracy is supported by fundamental instruments of multilateralism. The *Charter of the United Nations* under Chapter I, art 1(2), provides that ‘the Purposes of the United Nations are . . . to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples’.⁷⁴ Other important instruments articulating this right are the *Universal Declaration of Human Rights*, the *International Covenant on Economic, Social, and Cultural Rights* and the *International Covenant on Civil and Political Rights*. The *Universal Declaration of Human Rights* states:

‘The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.’⁷⁵

⁷² See UN GAOR 3d Comm., 52d Sess, Agenda Item 112(b), UN Doc A/C.3/52/L.44 (1998) [subsequently passed as GA Res 119, 52d Sess, UN Doc A/Res/52/119 (1998)].

⁷³ See UN GAOR 3d Comm., 52d Sess, Agenda Item 112(b), UN Doc A/C.3/52/L.44 (1999) [subsequently passed as GA Res 129, 52d Sess, UN Doc A/Res/52/129 (1999)].

⁷⁴ *Charter of the United Nations* art 1(2).

⁷⁵ *Universal Declaration of Human Rights* .

The *International Covenant on Economic, Social, and Cultural Rights* and the *International Covenant on Civil and Political Rights* provide that: ‘All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social, and cultural development’.⁷⁶ Professor Thomas Franck argues that these documents together with regional instruments constitute ‘a net of participatory entitlements’.⁷⁷ Commentators note that the right to democracy has developed within international agreements. Professor Thomas Franck finds that democracy, ‘while not yet fully word made law, is rapidly becoming in our time, a normative rule of the international system’.⁷⁸ On his part, Gregory Fox asserts that ‘parties to the major human rights conventions have created an international law of participatory rights’.⁷⁹

The assertion that the principle of democracy and the rights which together constitute the democratic prerogative are ‘guaranteed in all comprehensive human rights instruments’⁸⁰ is not empty rhetoric. Infact the greatest progress in specifying the elements of democratic governance has been made in regional systems and, in particular, within the OSCE.⁸¹ At a 1990 meeting in Copenhagen, for example, members of the OSCE (then referred to as the CSCE) spelled out some of the characteristics of democratic systems and the rule of law.⁸²

⁷⁶ *International Covenant on Economic, Social, and Cultural Rights*, 16 December 1966, art 1, 993 UNTS 3; *International Covenant on Civil and Political Rights (ICCPR)*, 16 December 1966, 999 UNTS 171, 6 *ILM*, 356 at art 1.

⁷⁷ Franck, T. ‘The Emerging Right to Democratic Governance’ (1992) 86 *AmerJInt’lL*, 46 at 79.

⁷⁸ Franck, T. ‘The Emerging Right to Democratic Governance’ (1992) 86 *AmerJInt’lL*, 46 at 46.

⁷⁹ Fox, G. ‘The Right to Political Participation in International Law’ (1992) 17 *Yale Journal of International Law*, 539 at 607.

⁸⁰ Gregory H Fox, ‘The Right to Political Participation in International Law’ (1992) 86 *American Society of International Law: Proceedings of the 88th Annual Meeting*, 249. See also: Franck, T. ‘The Emerging Right to Democratic Governance’ (1992) 86 *AmerJInt’lL*, 46 at 46; Fox, G. ‘The Right to Political Participation in International Law’ (1992) 17 *Yale Journal of International Law*, 539 at 539.

⁸¹ ‘Conference on Security and Co-operation in Europe: Final Act.’ 1 August 1975. (1975) 14 *ILM*, 1292 (‘*Helsinki Accords*’).

⁸² ‘Conference on Security and Cooperation in Europe: Document of the Copenhagen Meeting of the Conference on the Human Dimension.’ 29 June 1990. (1990) 29 *ILM*, 1305 (‘*Copenhagen Document*’).

This list included: 1) free elections; 2) the need for representative government; 3) accountability of the executive to an elected legislature or the electorate as a whole; 4) a clear separation between the State and political parties; 5) an independent judiciary; 6) military and police forces under civilian control; and 7) a panoply of related human rights.⁸³

Importantly, in addition to guaranteeing democratic freedoms to the individual, recent instruments view democracy as both a keystone of human rights and a necessary condition for international peace and security. Reflecting the proliferation of democracies throughout the 1980s and 1990s, the *Document of Copenhagen*⁸⁴ commits participating states to the individual freedoms of democracy, including free elections, representative government, government compliance with law and separation between the State and political parties. The CSCE's *Charter of Paris*⁸⁵ pledges to 'undertake to build, consolidate, and strengthen democracy as the only system of government of our nations'.⁸⁶ In addition to guaranteeing democratic freedoms to every individual, the thirty-four participating states proclaimed: 'Democracy is the best safeguard of freedom of expression, tolerance of all groups of society, and equality of opportunity for each person'.⁸⁷ In the Moscow meeting of the CSCE, participating states asserted that 'full

⁸³ 'Conference on Security and Cooperation in Europe: Document of the Copenhagen Meeting of the Conference on the Human Dimension.' 29 June 1990. (1990) 29 *ILM*, 1305 at 1308-1309.

⁸⁴ 'Conference on Security and Cooperation in Europe: Document of the Copenhagen Meeting of the Conference on the Human Dimension.' 29 June 1990. (1990) 29 *ILM*, 1305 ('*Copenhagen Document*').

⁸⁵ 'Conference on Security and Co-operation in Europe: Charter of Paris for a New Europe and Supplementary Document to Give Effect to Certain Provisions of the Charter.' 21 November 1990. (1991), 30 *ILM*, 190 ('*Charter of Paris*').

⁸⁶ 'Conference on Security and Co-operation in Europe: Charter of Paris for a New Europe and Supplementary Document to Give Effect to Certain Provisions of the Charter.' 21 November 1990. (1991), 30 *ILM*, 190 at 193 ('*Charter of Paris*'). Leaders of thirty-four participating states of the CSCE convened in Paris and adopted the Charter of Paris on 21 November 1990 to initiate 'a new era of democracy, peace and unity'.

⁸⁷ 'Conference on Security and Co-operation in Europe: Charter of Paris for a New Europe and Supplementary Document to Give Effect to Certain Provisions of the Charter.' 21 November 1990. (1991), 30 *ILM*, 190 at 193 at 194.

respect for human rights and fundamental freedoms and the development of societies based on pluralistic democracy and the rule of law are prerequisites for a lasting order of peace, security, justice and co-operation in Europe'.⁸⁸ Participating states found that 'issues relating to human rights, fundamental freedoms, democracy and the rule of law are of international concern, as respect for these rights and freedoms constitutes one of the foundations of the international order'.⁸⁹

International conferences in the 1990s mirrored the CSCE's concerns. The *Vienna Declaration*⁹⁰ of the United Nations World Conference on Human Rights 'considers the denial of the right of self-determination as a violation of human rights and underlines the importance of the effective realization of this right'.⁹¹ The participating states expressly defined self-determination to include a democratic entitlement, noting that it is through self-determination that peoples 'freely determine their political status, and freely pursue

⁸⁸ 'Conference on Security and Cooperation in Europe: Document of the Moscow Meeting on the Human Dimension, Emphasizing Respect For Human Rights, Pluralistic Democracy, The Rule of Law, and Procedures for Fact-Finding.' 3 October 1991. (1991) 30 *ILM*, 1670 at 1671-1672 ('*Moscow Document*'). The Moscow Meeting convened in Moscow from September 10 to October 4, 1991 and was attended by representatives of the following participating states of the CSCE: Albania, Austria, Belgium, Bulgaria, Canada, Cyprus, the Czech and Slovak Federal Republic, Denmark, Estonia, Finland, France, Germany, Greece, the Holy See, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Monaco, the Netherlands, Norway, Poland, Portugal, Romania, San Marino, Spain, Sweden, Switzerland, Turkey, the USSR, the United Kingdom, the United States of America and Yugoslavia.

⁸⁹ 'Conference on Security and Cooperation in Europe: Document of the Moscow Meeting on the Human Dimension, Emphasizing Respect For Human Rights, Pluralistic Democracy, The Rule of Law, and Procedures for Fact-Finding.' 3 October 1991. (1991) 30 *ILM*, 1670 at 1672.

⁹⁰ 'United Nations World Conference on Human Rights: Vienna Declaration and Program of Action.' (1993) 32 *ILM*, 1661 at 1665 ('*Vienna Declaration*').

⁹¹ 'United Nations World Conference on Human Rights: Vienna Declaration and Program of Action.' (1993) 32 *ILM*, 1661 at 1665. The World Conference on Human Rights was assembled in Vienna by the United Nations on June 14-25, 1993. Representatives of 171 States attended. The *Vienna Declaration* was adopted by acclamation on 25 June 1993: 'United Nations World Conference on Human Rights: Vienna Declaration and Program of Action.' (1993) 32 *ILM*, 1661 at 1661. The *Vienna Declaration* states that the focus of 'cooperation, development and strengthening of human rights' should be on 'strengthening and building of institutions relating to human rights, strengthening of a pluralistic civil society and the protection of groups which have been rendered vulnerable.' To this end, assistance is necessary for 'the conduct of free and fair elections, ... the strengthening of the rule of law, the promotion of freedom of expression and the administration of justice, and ... the real and effective participation of the people in the decision- making processes.' 'United Nations World Conference on Human Rights: Vienna Declaration and Program of Action.' (1993) 32 *ILM*, 1661 at 1683.

their economic, social and cultural development'.⁹² The *Vienna Declaration* further affirmed that the 'World Conference on Human Rights considers the denial of the right of self-determination as a violation of human rights and underlines the importance of the effective realization of this right'.⁹³ The participating states asserted that 'democracy, development and respect for human rights, and fundamental freedoms are interdependent and mutually reinforcing'. Finally, the participating states agreed that 'democracy is based on the freely expressed will of the people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives'.⁹⁴

Regional initiatives together with the United Nations monitoring of elections have clarified the substantive meaning of the emerging right to democracy.⁹⁵ Gregory Fox lists criteria gathered from human rights instruments and United Nations practice in monitoring elections that define a free and fair election. These include:

- '1. periodic elections at reasonable intervals;
2. a secret ballot;
3. honesty in vote tabulation;
4. universal suffrage, with minor exceptions permitted for minors, prisoners, the mentally ill, and the like;

⁹² 'United Nations World Conference on Human Rights: Vienna Declaration and Program of Action.' (1993) 32 *ILM*, 1661 at 1665.

⁹³ 'United Nations World Conference on Human Rights: Vienna Declaration and Program of Action.' (1993) 32 *ILM*, 1661.

⁹⁴ 'United Nations World Conference on Human Rights: Vienna Declaration and Program of Action.' (1993) 32 *ILM*, 1661 at 1666.

⁹⁵ Fox, G. 'The Right to Political Participation in International Law' (1992) *American Society of International Law: Proceedings from the 88th Annual Meeting*, 249 at 250-253. See generally: Franck, T. 'The Emerging Right to Democratic Governance' (1992) 86 *AmerJInt'lL*, 46. United Nations monitoring of the elections can involve, as in the case of the United Nations Observer Group for the Verification of the Elections in Haiti (ONUVEH), verification of the use of secret ballots, public polling places, and voter registration: 'Haiti Holds Free, Democratic Elections with United Nations Help' *UN Chronicle*, March 1991 at 62. ONUVEH claimed that 'in a country that had been traumatized by the experience of the election on 29 November 1987, the first task of ONUVEH was to help create a psychological climate conducive to the holding of democratic elections.': 'Haiti Holds Free, Democratic Elections with UN Help' *UN Chronicle*, March 1991, 64.

5. an absence of discrimination against voters and candidates;
6. freedom to organise and join political parties, which must be given equal access to the ballot, and an equal opportunity to campaign;
7. to the extent the government controls the media, the right of all parties to present their views through the major media outlets;
8. supervision of the election by an independent council or commission not tied to any party, faction, or individual, whose impartiality is insured in both law and practice.⁹⁶

Policy trends of actors in the world community have further encouraged democracy as a right.⁹⁷ The United Nations has monitored over thirty elections, including those in Namibia, Nicaragua and Haiti.⁹⁸ Several Western European nations have attempted to withhold aid from those nations that are not democracies. On a regional level, the European Community and the United States have imposed on countries, such as the former Yugoslavia and the Balkan States, ‘conditions on recognition’ that include a commitment to democratic governance.⁹⁹ Additionally, restoration of democracy and the right of self-determination has figured prominently in the lawfulness of military action in the southern hemisphere. Today, many countries notably in the Third World consider a clean bill of health from foreign electoral observers as an important aspect of demonstrating their commitment and adherence to democratic ideals.

⁹⁶ Fox, G. ‘The Right to Political Participation in International Law’ (1992) *American Society of International Law: Proceedings of the 88th Annual Meeting*, 249 at 251.

⁹⁷ Fox, G. ‘The Right to Political Participation in International Law’ (1992) *American Society of International Law: Proceedings of the 88th Annual Meeting*, 249 at 250-252; Brown, B. ‘The Protection of Human Rights In Disintegrating States: A New Challenge’ (1992) 68 *Chicago-Kent Law Review*, 203 at 206; Weller, M. ‘The International Response to the Dissolution of the Socialist Federal republic of Yugoslavia’ (1992) 86 *AmerJInt’L*, 569 at 574-577; Franck, T. ‘Intervention Against Illegitimate Regimes’ IN Damrosch, L and others (eds). *Law and Force in the New International World Order*. Boulder: Westview Press, 1991, 177.

⁹⁸ Fox, G. ‘The Right to Political Participation in International Law’ (1992) 17 *Yale Journal of International Law*, 539 at 541.

⁹⁹ Fox, G. ‘The Right to Political Participation in International Law’ (1992) *American Society of International Law: Proceedings of the 88th Annual Meeting*, 249 at 250.

The biggest stumbling block though in the move towards democracy as an entitlement is that both within the United Nations and regional organisations there is no special set of institutional procedures for handling interruptions in democratic governance, much less for addressing undemocratic regimes generally. As a result, any effort to promote democracy through the political organs of the United Nations is subject to all the vagaries of United Nations politics. The procedures within regional organisations are little better. The Moscow and Copenhagen documents commit the member states, morally if not legally, to ‘defend and protect’ the ‘democratic order’ in any participating state against a violent overthrow.¹⁰⁰ But the steps to be taken are not specified, not even to the extent of outlining the institutional procedures to be followed to determine what those steps should be. Although one author has argued that the *Copenhagen Document* implicitly authorizes military intervention to protect democracy,¹⁰¹ it seems unlikely that the signatories would interpret it this way.

Despite acknowledgment of democracy as an entitlement there exist minimal international and regional procedures for responding to unconstitutional seizures of power and flawed elections. Steps to be taken are not specified with regional and international efforts constrained by the non-intervention provisions¹⁰² of the *Charter of the United Nations* and continued opposition of states to anything that might open the door too widely to

¹⁰⁰ See: ‘Conference on Security and Cooperation in Europe: Document of the Copenhagen Meeting of the Conference on the Human Dimension.’ 29 June 1990. (1990) 29 *ILM*, 1305 at 1309 mandating that the participating states defend democracy; Cf. ‘Conference on Security and Cooperation in Europe: Document of the Moscow Meeting on the Human Dimension, Emphasizing Respect For Human Rights, Pluralistic Democracy, The Rule of Law, and Procedures for Fact-Finding.’ 3 October 1991. (1991) 30 *ILM*, 1670 at 1677-1678 affirming their dedication to democratic principles.

¹⁰¹ See: Halberstam, M. ‘The Copenhagen Document: Intervention in Support of Democracy’ (1993) 34 *HarvInt’lLJ*, 163 at 166-167.

¹⁰² See: ‘Charter of the Organisation of American States.’ 30 April 1948. 2 UST 2394, 119 *UNTS* 3 as amended by the Protocol of Buenos Aires in 1967 and the Protocol of Cartagena in 1985, art 3(e), 33 *ILM*, 987 at 990 (in force as of 16 November 1988). For a more recent integrated text of the *OAS Charter*, including the 1993 amendments from the Protocol of Managua see ‘Charter of the Organisation of American States.’ OAS Permanent Council, OEA/ser. G CP/INF.3964/96 (prov. ed. 1996) (entered into force 29 January 1996).

intervention in internal affairs. There is simply no consensus, within regional and other international organisations, on strengthening significantly their institutional capacity to promote democracy. Any substantial departure from present practice must survive the critical scrutiny of veto-wielding states such as China and Russia¹⁰³ as well as potentially hostile regional blocs in the Middle East, Asia and Africa. As a result of differences among states, departures from democratic principles are likely to prompt a significant collective international response only in exceptional circumstances. On rare occasions, as in Haiti, it may prove possible for states to agree on collective measures to restore the ousted government to power,¹⁰⁴ but in general, easy cases of the sort represented by Haiti continue to be very few and far between.

CONCLUSION

The normative basis for the right to democracy is discerned in the historical development of human rights law. There is a persuasive case to be made for a democratic tradition in international law.

‘Even the strongest critics of democracy are not denying the value of the concept, but rather they are cautious about accepting it blindly and ignoring the consequences and other potentially valid ideological perspectives.’¹⁰⁵

¹⁰³ See: *Charter of the United Nations* art 23, para 1 listing the permanent Security Council Members, which include China and the former Union of Soviet Socialist Republics.

¹⁰⁴ See *Report of the Secretary-General on the United Nations Mission in Haiti*, UN SCOR, 49th sess, at 3, UN Doc S/1994/828 (1994).

¹⁰⁵ Barnes, R. ‘Book Review, “Democratic Governance and International Law”’ (2000) 8 *Indiana Journal of Global Legal Studies* 281 at 297.

The *Universal Declaration on Human Rights* is the premier instrument on the right to democracy, and it contains the clearest statement on the issue of democracy.¹⁰⁶ While General Assembly resolutions are often regarded as not binding,¹⁰⁷ it must be noted that the *Universal Declaration of Human Rights* is not just another General Assembly Resolution. ‘It has become an edifying referent for state constitutions, whose contents sometimes are a wholesale adoption of provisions of the Universal Declaration.’¹⁰⁸ Beyond state boundaries, the *Universal Declaration of Human Rights* has inspired regional and international agreements.¹⁰⁹ The influence of the *Universal Declaration of Human Rights* on subsequent international and regional developments regarding democratic governance is testament that it has effectively shed whatever stigma attended the circumstances of its birth. The eminence of the declaration is evident in its endorsement as a reflection of customary international law.¹¹⁰ In fact the UN observes that the broadest legally binding human rights agreements, the *International Covenant on Economic, Social and Cultural Rights*¹¹¹ and the *International Covenant on Civil and*

¹⁰⁶ *Universal Declaration of Human Rights* art 21.

¹⁰⁷ The conclusion that the resolutions are mere recommendations is based on narrow logic. If the fundamental principles of the United Nations are collectivism and sovereign equality, then one must concede at least that resolutions carry the moral force of the opinions of most sovereign states. *The General Assembly’s Uniting for Peace Resolution*, G.A. Res. 377A, U.N. GAOR, 5th sess., Supp. No. 20, 302d plen. Mtg, [10]-[12], U.N. Doc. A/1775 (1950) demonstrated the residual legal capacity of the General Assembly. In any event, there can be no better evidence of a general practice accepted as law than the resolutions of states reached in the most widely representative and democratic organ of the United Nations, and in the course of discussing issues under the Charter, which, juridically, is the constitution of the United Nations.

¹⁰⁸ Ezetah, R. ‘The Right to Democracy; A Qualitative Inquiry’ (1997) 22 *Brooklyn Journal of International Law*, 495 at 506-507.

¹⁰⁹ See: Schwelb, E. and Alston, P. ‘The Principal Institutions and Other Bodies Founded Under the Charter’ IN Vasak, K. and Alston, P (ed) *The International Dimensions of Human Rights Vol 1*. Westport: Greenwood Press, 1982, 231 at 245.

¹¹⁰ The Universal Declaration is seen as having ‘evolved into the Magna Carta of the international human rights movement and the premier normative international instrument on the subject’ Buergenthal, T. ‘The Human Rights Revolution’ (1991) *StMary’sLJ*, 3 at 7; See also: Alston, P. ‘The UN’s Human Rights Record: From San Francisco to Vienna and Beyond’ (1994) 16 *Human Rights Quarterly*, 375 at 376.

¹¹¹ *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, art 1,993 UNTS.

*Political Rights*¹¹², have ‘take[n] the provisions of the Universal Declaration a step further by making them binding upon States parties’.¹¹³

Article 21 of the *Universal Declaration of Human Rights* emphasises the overriding importance of the will of the people.¹¹⁴ Therefore, a government that is not based on the consent of the governed is not democratic. In addition, the government must be substantially representative of all distinct groups in the country. It follows that representation should be manifest in active as opposed to nominal participation such that ‘representation and participation (are) experienced as part of a continuum’.¹¹⁵ To be legitimate and democratic in international law, the emerging government must be based on the consent of the people and must be participatorily representative of all national and distinct political groups in the country.

There has been relatively broad (though by no means uniform) acceptance of the principle that elections should entail competition among multiple political parties - something Soviet-bloc states rejected for years.¹¹⁶ Additionally, substantial international agreement now exists on many of the procedural and substantive prerequisites for free and fair elections.¹¹⁷

¹¹² *International Covenant on Civil and Political Rights* (ICCPR), 16 December 1966, 999 UNTS 171, 6 ILM 368.

¹¹³ See The United Nations at 50: Notes for Speakers (1995) 52.

¹¹⁴ *Universal Declaration of Human Rights* art 21(3).

¹¹⁵ See: Thornberry, P. ‘The Democratic or Internal Aspect of Self- Determination with Some Remarks on Federalism’ in Tomuschat, C. (ed) *Modern Law of Self- Determination: Towards a Democratic Legitimacy Principle*. Boston: M Nijhoff Publishers, 1993, 101 at 116.

¹¹⁶ Roth, B. ‘Government Illegitimacy Revisited: “Pro-Democratic” Armed Intervention in the Post-Bipolar World’ (1993) *Transnational Law and Contemporary Problems* 48 at 506-07.

¹¹⁷ Such prerequisites include near-universal adult suffrage, the right to vote in secret and to have one’s vote counted equally with that of others, the right to campaign, to form political parties, to express political opinions without interference, to seek and receive information, to have reasonable access to mass media, and to have an effective remedy for violation of political and electoral rights.

'Elections, however, are only part of any democratic system. They may assist in the formation of a government responsive to the popular will, but they do not guarantee such a government. In many countries, systemic problems override the positive effects of free elections. In a number of Latin American states, for example, entrenched militaries, powerful business elites, lopsided patterns of resource distribution, and a history of human rights abuses all sharply constrain the ability of elected governments to alter existing political relations'.¹¹⁸

In some countries, in Europe and elsewhere, the problem is just the opposite: elections result in governments that are too responsive to the popular will of an ethnic majority, and insufficiently attentive, or openly hostile to, minority group interests.¹¹⁹ In still other countries, elected governments abandon democratic principles after attaining office.¹²⁰ Acceptance and entrenchment of democracy involves the infusion of democratic social organization in key state mechanisms besides the current over reliance on formal procedural democratic processes as the benchmark. Concern with furthering democracy requires going beyond the procedural motions of democracy, such as universal suffrage, to the realization of democracy in substance. While formal mechanisms may constitute necessary components of a democratic society, they fall far short of being sufficient in achieving the substance of democracy.

For all the discourse surrounding the notion of democratic governance, there is as yet no broad consensus about what the notion means, what the content of it is and whether it exists as a basic legal entitlement for the citizenry necessitating enforcement (by whatever means available) by the international community. Naturally states are skeptical about

¹¹⁸ Wippman, D. 'Defending Democracy Through Foreign Intervention' (1997) 19 *Houston Journal of International Law*, 659 at 667.

¹¹⁹ See: Mansfield, E. and Snyder, J. 'Democratisation and War' (1995) 74 *Foreign Affairs*, 70 at 87.

¹²⁰ See: Rotberg, R. 'Democracy in Africa: The Ballot Doesn't Tell All' *Christian Science Monitor*, 1 May 1996 at 19.

recognizing that international law has fully recognized and incorporated an all-encompassing notion of democracy. This is especially so in view of the fact that conceptions of democracy developed by way of treaties and General Assembly Resolutions are notably open ended, part of the legacy of the Cold War polarization of democratic forms with both East and West claiming democracy, but sharply differing on ideological and substantive grounds. The end of the Cold War saw the ascendance of liberal democracy as the basis of a new world order but this ascendance is seen as strengthening a restrictive practice of democracy and threatening to the recognition of democratic heterogeneity. The developing world is especially wary of the new world order democratic discourse which is seen as promoting a conservative and protective form of liberal democracy hostile to the evolution of other popular and participatory democratic processes and thus part of a subtle Western expansionist agenda.

Though at both the international and regional level democracy has been recognised as an international norm, support for democracy is still expressed in general terms with no clear-cut international consensus existing as to the criteria that should be used to judge whether or not a particular government is substantively 'democratic'.¹²¹ In part, this is because many states still do not share the West's enthusiasm for liberal, parliamentary democracy. Some states, in particular Islamic and Asian states, view much of the recent rhetoric about democratic governance as a misplaced attempt to transplant western institutions and structures of governance to countries with radically different cultural and

¹²¹ See: Roth, B. 'Evaluating Democratic Progress: A Normative Theoretical Approach' (1995) 9 *Ethics and International Affairs*, 55.

political traditions.¹²² In their view, any attempt to impose a western blueprint for democracy constitutes nothing short of cultural imperialism.¹²³

Even within regional systems with a relatively strong commitment to democratic government, evaluation of actual cases may prove very difficult.¹²⁴ The problem is particularly acute in the case of new or emerging democracies attempting to overcome a long legacy of authoritarian mismanagement in a climate of economic decline and political instability.¹²⁵ In the states of the former Soviet Union, for example, it is relatively easy to make judgments about whether national elections have been fairly conducted.¹²⁶ Even when states can agree on the character of a particular state's government, they may disagree strongly on the approach the international community should take to dealing with that government.¹²⁷ Many states remain firmly convinced that the character of a state's government is fundamentally a matter of domestic concern.¹²⁸ Some states, however, acknowledge that democratic governance has become a subject of international

¹²² Compare: Mayer, A. 'Universal Rights Versus Islamic Rights: A Clash of Cultures or a Clash with a Construct' (1994) 15 *Michigan Journal of International Law*, 307 at 318 citing statements by representatives of Islamic governments to the 1993 Human Rights Conference in Vienna.

¹²³ Mayer, A. 'Universal Rights Versus Islamic Rights: A Clash of Cultures or a Clash with a Construct' (1994) 15 *Michigan Journal of International Law*, 307; Mann, J. 'Policy-Makers Race to Keep Up with New Asia' *Los Angeles Times*, 12 July 1993 at A1 quoting President Clinton's denial that 'democracy and human rights are somehow unsuited to parts of Asia or that they mask some cultural imperialism on the part of the West'.

¹²⁴ For example: the states of the European Union (then the EC) agreed on criteria for recognizing new and emerging states in the former Soviet Union and Eastern Europe. See: 'Declaration on the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union.' *EPC Press Release 128/91* (16 December 1991), reprinted in (1992) 31 *ILM*, 1486 at 1486-1487. Those states then failed to follow the criteria in decisions concerning the recognition of Croatia and Macedonia. Compare with: 'Declaration on Yugoslavia and on the Guidelines on the Recognition of New States', reprinted in (1992) 31 *ILM*, 1485 at 1485-1486.

¹²⁵ See: Mansfield, E. and Snyder, J. 'Democratization and War' (1995) 74 *Foreign Affairs*, 70 at 88-94 describing problems experienced by newly democratising states.

¹²⁶ See: Fox, G. 'The Right to Political Participation in International Law' (1992) 17 *Yale Journal of International Law*, 539 at 570 listing four criteria used to judge whether an election is 'free, fair and legally sufficient: 1) universal and equal suffrage; 2) secret ballots; 3) regularly scheduled elections; and 4) no discrimination based on certain voters, parties, or candidates'.

¹²⁷ See generally: Fidler, L. 'Politics Across Borders: Non-intervention and No forcible Influence Over Political Affairs' (1989) 83 *AmerJInt'IL*, 1 discussing the debate over foreign intervention: when and how it should be done.

¹²⁸ See: Fox, G. 'The Right to Political Participation in International Law' (1992) 17 *Yale Journal of International Law*, 539 at 590-91.

commitments and therefore of international concern, but believe strongly that change should be effected through dialogue and negotiation rather than through any other more pragmatic measures.¹²⁹

¹²⁹ See: Damrosch, L. and others (ed) *Law and Force in the New International World Order*. Boulder: Westview Press, 1992, 4.